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Supreme Court, U.S.
FILED
SEP 19 1997
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No. 97-319

In the

Supreme Court of the United States

October Term, 1996

CHEZ SEZ, VIII, INC., t/a United Video, et al.,

Petitioners,

v.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Brief of the Respondents in Opposition to Petition

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27pp

QUESTIONS PRESENTED

1. Whether a New Jersey statute which prohibits sexually oriented businesses from offering for public use booths, screens, or enclosures for viewing videos or movies, that are sufficiently private so as to "facilitate sexual activity," is unconstitutionally vague.

2. Whether the restriction on the design of only those booths or enclosures which are located in sexually oriented businesses, when there is evidence that high-risk sexual conduct leading to the spread of disease takes place in private booths in such businesses, is an unconstitutional content-based regulation of protected speech.

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No. 97-319

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CHEZ SEZ, VII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

v.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Brief of the Respondents in Opposition to Petition

STATEMENT OF THE CASE

The New Jersey statute at issue here provides that a person is guilty of a crime of the fourth degree if he or she "owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons." The Legislature prohibited booths that facilitate sexual activity in order to halt high-risk sexual conduct that leads to the spread of Acquired Immune Deficiency Syndrome ("AIDS") and other diseases.

Petitioners, owners and operators of sexually oriented businesses, challenged this statute in State court on freedom of speech grounds. The trial court erroneously struck down the act and enjoined enforcement but the New Jersey Superior Court, Appellate Division, correctly reversed.

The Appellate Division properly held that the statute fully accords with the United States and New Jersey Constitutions. The Appellate Division recognized that the statute regulates sexual activity in order to address a public health problem and does not restrict materials viewed in booths. The Appellate Division further ruled that the statute is not vague, noting that owners and operators of sexually oriented businesses should know that patrons would be more likely to engage in sexual relations in private booths, which are prohibited, rather than in open cubicles, which are permitted. Accordingly, the Appellate Division correctly applied the facts to well-settled law and declared the statute constitutional. Because this case does not raise issues that warrant Supreme Court review, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

As noted above, the statute which is the subject of this case, 1995 N.J.Laws 167 (codified at N.J.Stat.Ann. § 2C:33-12.2 (West 1997)), prohibits owners or operators of sexually oriented businesses from offering for public use booths, screens, or enclosures for viewing videos or movies, in which patrons are known to engage in sexual activity, including high-risk, unprotected sex with anonymous partners. Specifically, N.J.Stat.Ann. § 2C:33-12.2 provides that a person is guilty of a crime of the fourth degree if he or she "owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons."[1] An

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[1] The statute defines a "sexually oriented business" as a "commercial establishment which as one of its principal business purposes

accompanying amendment to N.J.Stat.Ann. § 2C:33-12.1 authorizes a court to order the immediate abatement of the nuisance created by one found guilty of violating N.J.Stat.Ann. § 2C:33-12.2, may order the building which is the subject of a violation to be closed for up to one year, and may order forfeiture of personal property possessed or used with a purpose of maintaining the nuisance. N.J.Stat.Ann. § 2C:33-12.1a (West 1997).

The legislative history of N.J.Stat.Ann. § 2C:33-12.2 is extensive and illuminating. The Senate Judiciary Committee reviewed a memorandum by a member of the Office of Legislative Services and Committee aide, as well as a lengthy statement with exhibits prepared by the President of the Atlantic County American Family Association of New Jersey. The memorandum provides:

> Many adult book stores display sexually oriented movies and live sex acts to patrons in private booths or similar enclosures. These private booths often encourage anonymous sexual acts by patrons. As this type of conduct is conducive to the spread of sexually transmitted diseases, [the bill] would provide that any person who owns or operates a sexually oriented business which offers for public use private booths or other similar enclosures is guilty of maintaining a nuisance.

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offers for sale, rental or display . . . books, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a 'specified sexual activity' or 'specified anatomical area' . . .." N.J.Stat.Ann. § 2C:33-12.2(1)(a).

The memorandum further notes that the Third Circuit, in *Mitchell v. Commission on Adult Entertainment Establishments*, 802 F.Supp. 1112 (D. Del. 1992), *aff'd*, 10 F.3d 123 (3d Cir. 1993), had recently upheld the constitutionality of a Delaware statute "with provisions similar to those proposed in [the bill]."

The statement before the Committee describes booths in adult entertainment establishments where persons have unprotected sex with anonymous partners in the same booth or in an adjoining booth through so-called "glory holes" in the side wall. Attached to this statement was a copy of the Delaware statute upheld in *Mitchell* as well as excerpts from numerous newspaper articles and court opinions concerning the use by patrons of private video booths in adult entertainment establishments for unprotected sexual activity. A press release from the Pennsylvania Attorney General concerning two adult book stores where male customers had engaged in illicit sexual activity through holes in the video booth partitions was also attached. The attachments reported that some patrons masturbate in the booths, that semen and blood are frequently found on the walls, and that defecation and urine are found on the floors. The articles stated that male prostitutes would engage in homosexual activity in the booths. Another article concluded that "some peep-show patrons would be more likely to engage in sexual activities with one another behind closed doors than in open cubicles."

The Delaware statute at issue in *Mitchell* provides that, to reduce the transmission of communicable diseases such as AIDS, commercial buildings may not have partitions with apertures that "facilitate sexual activity between persons on either side of the partition." Del.Code Ann. tit. 24 § 1633(b)(1) (1996). Booths, stalls, or rooms in which movies are viewed may not have doors, curtains or portal partitions, unless at least one side is open to an adjacent public room and the area inside is visible to persons in that adjacent public room. Del.Code Ann. tit. 24 § 1633(b)(2). The Sponsor

Statement accompanying the Delaware statute reflects the legislative purpose:

> This Act provides that no adult entertainment establishment shall be so constructed as to facilitate high-risk sexual conduct. This includes rooms or partitions between the rooms which might be so constructed as to facilitate anonymous sex; and includes booths or partitioned rooms specifically equipped for "motion pictures or other forms of entertainment."

Thereafter, the New Jersey Senate Committee reported the bill to the full Senate without amendment. The Committee Statement accompanying the bill provided that "private booths or similar enclosures . . . often encourage anonymous sexual acts by patrons." The bill passed the New Jersey Senate unanimously.

When the Assembly Judiciary, Law and Public Safety Committee considered the bill, a Senior Deputy Attorney General appeared and stated the Attorney General's position that a ban on booths that facilitate sexual activity would improve sanitation at adult entertainment establishments and retard the spread of sexually-transmitted diseases. The Senior Deputy Attorney General also apprised the Committee of the treatment of the Delaware statute by the Third Circuit in *Mitchell* and read parts of the Third Circuit opinion to the Committee.

A statement in support of the bill was submitted to the Assembly Committee by the State Director of Concerned Women for America. This statement provided in relevant part that regulating sexually oriented businesses

which "encourage anonymous, disease-spreading sexual activity" furthers a compelling State interest.

The Assembly Committee reported the bill to the full Assembly with one technical amendment. The Committee Statement accompanying the bill provided that "private booths or similar enclosures . . . often encourage anonymous sexual acts by patrons." The Assembly unanimously passed the amended bill. Governor Whitman then signed the bill on July 5, 1995, and the law was to become effective on September 4, 1995. 1995 N.J.Laws 167.

Prior to the effective date, petitioners, owners and operators of adult entertainment establishments, brought suit in State court seeking to enjoin defendants New Jersey Attorney General and the State of New Jersey from enforcing N.J.Stat.Ann. § 2C:33-12.2 (A32). Plaintiffs alleged that they offer on their premises individual, enclosed booths for patrons to view films or videos (A33-35). Plaintiffs contended that the statute abridges their freedom of speech, denies them equal protection of the laws, and fails to provide proper notice of the prohibited conduct (A39-40).

The trial court issued a preliminary, then permanent, injunction restraining enforcement of the statute (A31). The trial court found that the purpose of the statute -- to deter anonymous, unprotected sexual contact which leads to the spread of sexually-transmitted diseases -- was a compelling governmental interest (A28). The trial court further construed N.J.Stat.Ann. § 2C:33-12.2 to prohibit the operation of a sexually oriented business which contains *any* booths for video viewing, (A28), and struck down the statute as unconstitutional because it did not employ the least restrictive means available to advance the state interest (A28-29).

Moreover, the trial court noted that if it accepted the State's argument that N.J.Stat.Ann. § 2C:33-12.2 is

intended only to regulate certain types of booths and not prohibit all of them, then the statute is unconstitutionally vague (A29). The trial court did not reach plaintiffs' equal protection argument.

The State appealed and the Appellate Division reversed and vacated the stay of enforcement. The Appellate Division noted that the statute does not ban the viewing of sexually explicit materials but, rather, is focused on conduct, prohibiting sexually oriented businesses from providing private booths which facilitate sexual activity by patrons (A8). According to the Appellate Division, the statute is content-neutral because it is aimed at curbing high-risk sexual activity rather than suppressing speech: "On its face the statute is intended to regulate sexual conduct as a health problem, not the materials presented." (A8).

Accordingly, the Appellate Division ruled that because the statute affects activity rather than speech, the Legislature need not use the least restrictive means but, rather, need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation." (A15, quoting *Mitchell*, *supra*, 10 F.3d at 137). The Appellate Division held that the statute did not limit available materials and did not prohibit people from watching films in individual enclosures so it left ample alternative modes for viewing the materials (A18).

In addition, the Appellate Division rejected the trial court's finding that the statute was vague (A21). The Appellate Division noted that the statute

> adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open

> to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person. Through simple supervision owners can monitor and detect the activities of their patrons. [A21].

The Court further explained that "enclosures meeting other jurisdictions' physical requirements would be permissible under the State's statute. For example, if the interior of a booth is visible to a public room it would not be considered conducive to sexual activity any more than other areas of the business that are open to the public and visible to visitors, customers and store personnel." (A17).

Petitioners filed an appeal and a petition for certification to the New Jersey Supreme Court. The appeal was dismissed and the petition denied on May 21, 1997 (A1).

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT CORRECTLY APPLIED WELL-SETTLED LAW AND THE CASE DOES NOT PRESENT ANY "SPECIAL AND IMPORTANT REASONS" WARRANTING REVIEW BY THE SUPREME COURT.

A petition for a writ of certiorari may be granted "only when there are special and important reasons therefor." Sup.Ct.R. 10. "Special and important reasons" are present in cases in which a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct.R. 10(c). Contrary to petitioner's assertions, this case involves the application of well-settled law and, therefore, does not warrant review by this Court.

As the Court has explained, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.'" *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Indeed,

> [a] federal question raised by a petitioner may be "of substance" in the sense that abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor

> does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. [*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (citations omitted)].

Petitioners argue that N.J.Stat.Ann. § 2C:33-12.2 contravenes principles of freedom of speech in the First Amendment to the United States Constitution[2] because the statute does not employ the least restrictive means to achieve the legislative goal (P19). Petitioners further argue that the statute contravenes principles of due process because it is vague (P7). These arguments are without merit. The Appellate Division correctly held that the Legislature intended to regulate *conduct* by foreclosing the use of private booths in which patrons are known to engage in high-risk sexual activity. In addition, the Appellate Division correctly ruled that the type of booth that is proscribed pursuant to the statute, one which "facilitates sexual activity," is not vague

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[2] The First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," applies to the states through the Due Process Clause of the Fourteenth Amendment. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Petitioners also challenged the statute as violative of the corollary provision in the New Jersey Constitution, Article I, Paragraph 6, which provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

but, rather, has a clear meaning that owners and operators of sexually oriented businesses can readily understand.

Thus, this case involves application of well-settled law to a state statute. It does not present issues that warrant Supreme Court review, nor does it involve questions that have not already been addressed by the Supreme Court. Therefore, the petition for a writ should be denied because it does not concern a "special and important" question within the meaning of Rule 10.

A. The State Court Correctly Ruled That N.J.Stat.Ann. § 2C:33-12.2 Is Not Vague.

Petitioners contend that the statute is vague and, further, that the Appellate Division's discussion of the type of booth that the statute proscribes made the terms of the statute even more vague. These contentions are without merit. The Appellate Division correctly recognized that the terms of the statute are easily understood by the ordinary owner or operator of this type of business.

As the Court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

> standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)(footnotes omitted)].

A law is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

However, statutory language need not provide "mathematical certainty"; it is enough that the reader can ascertain what the statute as a whole prohibits. *Grayned*, *supra*, 408 U.S. at 110. As the Appellate Division noted, "a common sense approach is appropriate in construing the enactment, in terms of the persons who may be subject to it, and in context with its intended purpose" (A19, citations omitted). There is, thus, no requirement that statutes be drafted in such a manner that every minute detail is provided; rather, legislatures are free to express their intentions in more general terms.

Moreover, if the legality of some booths may be subject to question, nullification of the entire statute does not necessarily follow. "That there may be marginal cases in which it is difficult to define the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too vague to define a criminal offense . . . . [T]he Constitution does not require impossible standards." *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

In this case, the Appellate Division recognized that the Legislature was entitled to take notice of other

jurisdictions' need for regulation of booths in sexually oriented businesses to address dangers to public health, as well as the methods other jurisdictions employed (A15). The court stated that the spread of sexually transmitted disease through high-risk conduct was a compelling problem and the Legislature may address this problem by prohibiting sexually oriented businesses from providing booths which facilitate this activity (A16-17). The court noted that the approach of other jurisdictions is to require the inside of the booth to be visible from the public areas of the business by setting specific physical restrictions on the type of booth permitted (A17). However, New Jersey's statute

> accomplishes the same result. As we construe the Act, enclosures meeting other jurisdictions' physical requirements would be permissible under the State's statute. For example, if the interior of a booth is visible to a public room it would not be considered conducive to sexual activity any more than other areas of the business that are open to the public and visible to visitors, customers and store personnel. Thus, New Jersey's statute embraces all the physical requirements of other jurisdictions, and leaves it to each proprietor to design a viewing area which will not facilitate sexual activity. [A17].

Like Delaware, New Jersey sought to ban booths that "*facilitate sexual activity* by patrons," but used more general terms. According to *Webster's Third International Dictionary* (Merriam-Webster 1976), "facilitate" means "to make easier or less difficult: free from difficulty or impediment." The Appellate Division ruled that the verb

"facilitate" has been found not to be vague by various other jurisdictions (A20).

There may be variations of booth construction that sidestep the explicit prohibitions in the Delaware statute while still affording occupants enough privacy to engage in sexual activity. Perhaps seeking to avoid permitting video booth construction loopholes, New Jersey chose not to provide a construction-oriented definition in its statute but retained the key description of a prohibited booth: one that "facilitates sexual activity."

The Appellate Division concluded:

> New Jersey's statute is not vague. It adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person. Through simple supervision owners can monitor and detect the activities of their patrons. [A21].

Petitioners should be adequately guided by this explanation of the meaning of the statutory prohibition.

Petitioners further contend that the statute does not provide adequate guidance to law enforcement personnel, thereby inviting arbitrary application of the law (P9). It should be apparent to law enforcement officials that an objectionable video booth is one that affords the occupants sufficient privacy, that is shielded from public view, thereby facilitating sexual relations by patrons. Accordingly, an open cubicle would be permitted but a private booth would not.

In sum, N.J.Stat.Ann. § 2C:33-12.2 is not vague. Ordinary owners and operators of sexually oriented businesses can readily ascertain that a booth that is open to public view is permitted and a private booth is not.

B. The State Court Applied the Proper Standard of Review Concerning Void-for-Vagueness Principles.

Petitioners argue that the Appellate Division applied the wrong standard of review with regard to the analysis of void-for-vagueness principles (P14). This contention is without merit. The Appellate Division correctly applied the law to the facts and reached a sound conclusion.

As petitioners point out, the Appellate Division did state that "[s]ince the challenge here to N.J.S.A. 2C:33-12.2 is not as applied, the statute must be reviewed on its face to determine if it is 'impermissibly vague in all its applications.' [*State v. Cameron*, 100 N.J. 586, 593 (1985)] (*quoting Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982))." (A19). The court, however, did not dwell further on the distinction between facial and as applied review, nor did it rest any holding on this distinction.

After setting forth the basic principles concerning vagueness challenges, the Appellate Division discussed other cases upholding open booth ordinances against challenge

based on vagueness principles, concluding that the New Jersey statute clearly defines the terms that set sexually oriented businesses apart from other businesses (A20). The court noted that the use of the verb "facilitate" in the statute is not vague (A20). The court then turned to the Seventh Circuit opinion in *Berg v. Health and Hospital Corp.*, 865 F.2d 797 (7th Cir. 1989), which held that the ordinance at issue there is not vague because, even though the language used is general rather than specific, persons of ordinary intelligence could identify which businesses are subject to the ordinance. (A20, quoting *Berg*, *supra*, 865 F.2d at 803).

The Appellate Division then concluded that the New Jersey statute is not vague because "[i]t adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area" (A21). Thus, the court properly applied the law and reached the correct conclusion, that the statute is not vague. Petitioners' contention that the court applied the wrong standards is without merit.

C. The Statute Adequately Defines the Type of Booth That Is Prohibited As One That Is Not Open To Any Public Area.

Petitioners contend that the statute is invalid because it adopts all requirements of other jurisdictions concerning such booths without specifying which requirements are controlling (P15). This contention is factually inaccurate. The Appellate Division held that the statute proscribes booths "not open to any public area." (A21). The court refers to requirements of other jurisdictions as examples: booths that meet the physical requirements of other jurisdictions would generally be permitted under New Jersey's statute. Thus, the court referred to other jurisdictions' requirements simply to further illustrate the

meaning of the statutory prohibition, not to incorporate those provisions into the New Jersey statute.

As noted above, the Appellate Division held that the Legislature is permitted to express its intention to prohibit private booths in more general terms than other jurisdictions had (A17). Thus, booths which "facilitate sexual activity" are prohibited. The ordinary owner or operator of a sexually oriented business should be aware that, while patrons may engage in sexual activity in the private booths, they do not generally engage in sexual activity in the store's more open areas. Accordingly, the court held that each proprietor may design a viewing area which will not facilitate sexual activity and, "[t]hrough simple supervision, owners can monitor and detect the activities of their patrons" (A17; A21). This conclusion was reasonable and fully supports the court's definition of a prohibited booth as one that is not open to any public area.

D. Denial of the Petition Does Not Express Any View of the Court on the Merits of This Case.

Petitioners contend that denial of its petition for a writ of certiorari will be viewed as approval of the statute (P16). This contention is misplaced. Denial of the writ carries no such message.

"[A]n order denying a petition for certiorari expresses no opinion on the merits of the case." *Carpenter v. Gomez*, __ U.S. __, __, 116 S.Ct. 488, 488 (1995) (Mem. of Stevens, J., Respecting the Denial of Certiorari). Denial of a petition "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion." *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950) (internal quotation omitted). Indeed, "this Court has rigorously insisted that such a denial carries with it no

implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *Id.* at 919.

Accordingly, denial of the petition is not properly viewed as expressing any opinion on the merits of this case. Rather, it simply reflects the Court's exercise of discretion concerning its docket. Therefore, petitioners' contention that such action would send a message is without merit.

E. The State Court Properly Held That N.J.Stat.Ann. § 2C:33-12.2 Is a Content-Neutral Restriction of Activity and Does Not Unlawfully Suppress Speech.

Petitioners argue that N.J.Stat.Ann. § 2C:33-12.2 is an unconstitutional restriction of protected speech. Specifically, petitioners contend that N.J.Stat.Ann. § 2C:33-12.2 does not employ the least restrictive means available to advance the state interest of halting high-risk sexual activity (P19). In addition, petitioners contend that the Legislature intended to ban *all* viewing booths, whether they be private or open (P20). However, petitioners' proposed standard of review is inapplicable and its view of the legislative history is erroneous.

The Appellate Division correctly noted that the statute does not ban the viewing of sexually explicit materials but, rather, prohibits sexually oriented businesses from providing booths which facilitate sexual activity by patrons (A8). According to the Appellate Division, the statute is not aimed at suppression of speech or expression: "On its face the statute is intended to regulate sexual conduct as a health problem, not the materials presented [in booths]." (A8).

The Appellate Division further ruled that because the statute affects activity rather than speech, the Legislature

need not pursue the least restrictive means but, rather, need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation." (A15, *quoting Mitchell, supra*, 10 F.3d at 137). Thus, petitioners' reliance on *Times Square Books, Inc. v. City of Rochester*, 645 N.Y.S.2d 951 (App. Div. 1996), is misplaced. In *Times Square Books*, plaintiffs offered to remove the bottom two feet of the doors to permit enforcement of an ordinance requiring only one person per booth; the court found this offer satisfactory because there was a "paucity of factual support for the City's action . . . ." *Id.* at 956-57. In contrast, the factual support for the New Jersey statute is extensive.

In addition, the New Jersey Appellate Division analyzed the statute as a content-neutral time, place, and manner regulation because its purpose was not to suppress speech but, rather, to address another problem (A14); *see City of Renton v. Playtime Theaters*, 475 U.S. 41, 47 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 63 (1976). A content-neutral time, place, and manner regulation is constitutional as long as it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *City of Renton, supra*, 475 U.S. at 48.

Stemming the spread of AIDS clearly is a substantial governmental interest. In addition, as the Appellate Division held, the statute does not limit the available materials and does not prohibit people from watching videos in individual enclosures (A18). Accordingly, the statute allows ample alternative modes for viewing the materials (A18).

Lastly, petitioners' arguments that the legislative history of N.J.Stat.Ann. § 2C:33-12.2 reflects the intent to ban all video booths in sexually oriented businesses, rather than only those private booths that facilitate sexual activity by

patrons, is without merit. The Senate and Assembly Committees both released Statements containing identical language that clearly indicated that the bills targeted a type of booth -- one that is private. Because the bills were passed by the Legislature essentially unchanged, the Committee Statements are reliable indicators of the legislative intent.

In sum, N.J.Stat.Ann. § 2C:33-12.2 fully accords with the United States Constitution and this case does not present any "special and important reason" warranting review by the Supreme Court. Therefore, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

Respectfully submitted,

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Dated: September 19, 1997